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09/944,198	09/04/2001	Rhonda Selleck	21854/0022	1190

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EXAMINER

PRATT, HELEN F

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 04/21/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/944,198

Applicant(s)

SELLECK, RHONDA

Examiner

Helen F. Pratt

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☐ Responsive to communication(s) filed on 9-4-01 (preliminary amd).
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-10 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-10 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

## **DETAILED ACTION**

### ***Specification***

The disclosure contains the following informalities, which have been corrected by the Examiner: on page 2, line 21, a period has been put at the end of the sentence. On page 5, line 19 "nd" should be – and - . on page 8, "whashehed" should be washed. In the claims, periods have been added at the end of claim 5 and 8. Applicant may want to check for further informalities.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 8 and 10 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claims 8 and 10 are indefinite in the use of the phrase "selected from one or more". It is not clear whether this is a Markush grouping. If it is the proper language "selected from the group consisting of ".

### ***Claim Rejections - 35 USC § 102***

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1 and 9 are rejected under 35 U.S.C. 102(b) as being anticipated by Tsurata (JP362126931A) or Sardo (6,403,139)

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Tsurata disclose a product and process of treating raw fruits and vegetables with a flavonoid and an organic acid or a calcium salt by spraying, coating or immersing as in claims 1 and 9 (abstract). The shelf life of the fruit is seen to have been extended because the reference discloses that coli bacillus are removed by this treatment (abstract). The vegetables are seen to have been minimally processed because they are raw.

Sardo discloses in FR patent 96/03100 that it is known to treat fruits or vegetables with an antioxidant of the polyphenol type (col. 1, lines 46-68).

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over Tsurato or Sardo as to claims 1 and 9 above and further in view of Kumami et al. (JP402100660A).

Claim 2 further requires that the minimally processed fruits (mp fruits) or vegetables are sprayed or immersed in a solution containing a flavonoid and then packaged. Raw vegetables are treated with an aqueous solution in Tsuruta by spraying coating and immersing. The French patent 96/03100 discloses placing fruits and vegetables in a liquid treating composition. Certainly, placing means immersion. Fruits

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and vegetables are known to be packaged in bags or trays, depending on the produce. No particular fruit or vegetable is claimed to give criticality to the type of packaging. Also Kumai et al. disclose that it is known to package foods, which have been treated with a flavonoid solution (abstract). Therefore, it would have been obvious to package the treated fruit or vegetable.

Claims 7 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over as applied to the above references, and further in view of Sono et al. (JP408332024).

Claim 7 further requires an antioxidant and claim 8 which antioxidant a particular antioxidant. Tsurata discloses the addition of an organic acid to the composition (abstract) as in claim 7. Sardo et al. discloses as his actual invention the use of tocopherols, which have a phenolic function and ascorbic acid. Granted the ascorbic acid did not rate well in the comparison test (col. 4, lines 55-58). However, it is a known antioxidant and did have some affect in treating apples. Ascorbic acid is often put on foods to prevent browning as in adding lemon juice to avocado, peaches and apple slices. Also, Sono et al. disclose that it is known to treat raw vegetables with Vitamin E, ascorbic acid and erythorbic acid and their salts and a vegetable polyphenol (abstract). Therefore, it would have been obvious to use an organic acid such as ascorbic acid in the process of Tsurata and to add it to the composition of the French patent or Sardo's invention, for its known function of preventing browning.

Claims 9 and 10 are also a product by process claims. The fact that the procedures of the reference are different than that of applicant is not a sufficient reason for allowing the product-by-process claims since the patentability of such claims is

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based upon the product formed and not the method by which it was produced. See *In re Thorpe* 227 USPQ 964. The burden is upon applicant to submit objective evidence to support their position as to the product-by-process claims. See *Ex parte Jungfer* 18 USPQ 2D 1796.

The product has been seen to have been shown as above as in claim 10. The particular amounts are seen to have been within the skill of the ordinary worker to determine absent anything new or unobvious. Therefore, it would have been obvious to make a preservative composition using particular amounts.

Claims 3 and 4 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above references as applied to claims 1 and 9 above, and further in view of *McArdle et al.*

Claim 3 requires that the flavonoid is added to the juice. *McArdle et al.* disclose that it is known to add flavonoids to juice (para. 0030). Nothing is seen that the addition of the flavonoids to the juice would not have extended the shelf life of the juice as the process is the same. Certainly, adding flavonoid powder, which contains the flavonoids would extend the shelf life of a product in making the color of the product acceptable for a longer period of time. Therefore, it would have been obvious to add flavonoids as disclosed by *McArdle et al.* in the process of the above references.

No patentable distinction is seen in using the juice of navel oranges, as the reference discloses that juice from oranges produced at particular times is not as colorful or tasty, as juice produced during the prime season, therefore, the juice needs

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to have additional ingredients to make it acceptable (col. 3, para. 009). Therefore, it would have been obvious to add flavonoids to various oranges that need enhancement.

***Allowable Subject Matter***


Claim 5 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 703-308-1978. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on (703) 308-3959. The fax phone number for the organization where this application or proceeding is assigned is 703-305-7718.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0651.

Hp 4-1-03

  
HELEN PRATT  
PRIMARY EXAMINER